VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP969/2015

CATCHWORDS

Domestic Building, each party alleges repudiation by the other, mental illness of the director of a party, anonymised orders and reasons, expert quantity surveyor report based in part on fictional documents, expert report not admitted into evidence or accorded no weight, threat of a party to leave the hearing, ending the hearing, building contract provisions for termination, failure to follow two-stage provision, alleged failure to complete the works in accordance with the contract, alleged failure to arrange an inspection within seven days of issuing final claim, owners' notice of termination, builder's allegation that owners' notice was repudiatory, allegation of criminal behaviour, variations - not in writing, quantum meruit in absence of a quantity surveyor's report: contract sum as adjusted by variations, no allowance for time, deductions for defects and incomplete work as a measure of the value received by the owners.

APPLICANT	WVY Pty Ltd
RESPONDENTS	Mr NSR, Mrs NSR
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	14 and 15 September 2017, 4 December 2017
DATE OF ORDER	9 March 2018
CITATION	WYV Pty Ltd v NSR (Building and Property) [2018] VCAT 334

ORDERS

1 The respondents must pay the applicant $4,563 forthwith.

2 Costs and interest are reserved with liberty to apply.

3 **I direct the Principal Registrar to send a copy of these orders and reasons to Mr N Faifer for his information.**

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Mr VJV, director
For Respondents	On 14 and 15 September 2017, Mr NSR in person On 4 December 2017 Mr and Mrs NSR in person

REASONS

1 In this proceeding both parties allege that the other repudiated the contract, and both say they elected to terminate the contract, based on the other party's repudiation. They agree that if the contract was still on foot, and the contract works completed properly and on time, there would be $5,755 still to be paid to the applicant-Builder, subject to adjustment for variations. The respondent-Owners say that they are entitled to deduct $1,000 for delay damages. They also say that there are defective works to the value of $7,411; therefore they seek a sum of $2,656.

2 The parties entered a building contract dated 21 March 2015 where the Builder was to undertake extensions and renovations to the Owners' home in a suburb of Melbourne for the contract sum of $57,550.

3 The Builder submits that as, on its view, the Owners repudiated the contract, it terminated the contract as it was entitled to do. The Builder claims that in consequence it is entitled to be paid the reasonable cost to it of the works carried out for the Owners - quantum meruit - of $93,115.14 and as the Owners have paid $51,795 the amount due to the Builder is $41,320.14. On the first day of the hearing, Mr NSR conceded that if the Builder proved that the Owners had repudiated the contract, the Builder would be entitled to quantum meruit, but he did not admit the amount to which the Builder would be entitled.

4 Mr VJV, director of the Builder appeared at the hearing for it and Mr NSR appeared on behalf of himself and his wife on the first two days of the hearing.

5 On the second day of hearing, 14 September 2017, I made orders, the second of which was:

> The hearing is adjourned to enable the applicant to have Mr Faifer appear and possibly the tiler and other parties, and to enable evidence to be given by the second respondent and the Proper Officer of Bunnings Narre Warren.

6 The second respondent, Mrs NSR appeared on 4 December 2017 with Mr NSR. Mr Norman Faifer, building consultant and quantity surveyor, who prepared a report for the Builder, did not attend the Tribunal to give evidence. Because of a challenge to Mr Faifer's report by the Owners, the Tribunal telephoned him in the afternoon of 4 December 2017 and he gave evidence on affirmation on the speaker phone. Mr Faifer was telephoned on his landline. He said he was not available to attend the Tribunal but did not explain why.

7 On 16 November 2017 a summons was issued by the Owners to the proper officer of the Bunnings Group Ltd. As discussed below under "Defects – Hanging Rail in Garage", Mr NSR presented an email from Adam Morton of Bunnings in answer to the summons.

8 The Owners filed a Tribunal Book ("OTB") to which they referred during the hearing. On the second day of the hearing Mr VJV handed up a six page document carrying the Owners' names and their address, and headed "Post Contract Owners Variations" ("Builder's Variation List"). He also referred to an 89 page document entitled "Dispute Correspondence in Chronological Order", filed by the Builder on 31 July 2017.

PARTICULAR DIFFICULTIES

9 This proceeding has been adjourned on a number of occasions, frequently because of Mr VJV's vulnerability to mental illness, which has been mentioned in evidence given for both parties. Mr VJV has also made allegations concerning alleged improper conduct by the respondents, various Tribunal members, the Victorian Building Authority and the Builder's previous solicitors.

10 Efforts were made to maintain decorum during this three day hearing, while giving Mr VJV more lee-way than is usually granted because of the ill-health he has suffered, while also taking his evidence and allegations seriously. Nevertheless, in the absence of evidence from the Builder or Owners about the impact that Mr VJV's mental illness would have on his behaviour, I make no allowance concerning the obligation of the Builder and its representative to give accurate evidence.

11 The parties have sent and received a great volume of correspondence which could best be described as argumentative. The correspondence also indicates that the personal exchanges between them were, on occasions, heated.

ISSUES CONCERNING REPORTS

The VBA report

12 At the commencement of the hearing on 14 September 2017, Mr VJV sought to impugn the inspection report prepared by the Victorian Building Authority ("VBA"). He submitted that the VBA report was defective because it was obtained under the previous[1] section 44 of the *Domestic Building Contracts Act 1995* ("DBC Act"), on the basis that there was no contract in force on the date of inspection.

13 Section 44 which was current on 7 July 2015 provided:

> **44 Party to dispute may ask for inspector to examine building works**
>
> (1) This section applies if a dispute arises under a domestic building contract.
>
> (2) Any person who is a party to a dispute may ask the Authority to appoint an inspector to examine whether or

[1] As it was until amended by Act 15 of 2016

> not the domestic building work performed by the builder is defective.

14 At paragraph 34 of his statement of 28 July 2017, Mr VJV said, with respect to s44(1):

> As the contract had been terminated due to the Owners' repudiation the domestic building dispute was no longer "under" contract.

The words used in s44(1) are not "under contract" but "a dispute arises under a domestic building contract". I am not satisfied that the building contract must be in existence at the time a party seeks appointment of an inspector under that section.

15 Mr VJV also alleged that Mr NSR had some sort of influence over the VBA, but gave no evidence of the influence. I accept Mr NSR'S evidence that he did not have any relationship with the VBA.

16 I note that Mr VJV was present at the inspection. Further under s98 of the *Victorian Civil and Administrative Tribunal Act 1998* ("VCAT Act") , the Tribunal can inform itself as it sees fit and accordingly, I do not exclude the report for "illegitimacy'. It is relevant to the quality of the work undertake by the Builder.

The Faifer report

17 As stated above, on the last day of hearing Mr NSR on behalf of the Owners challenged the admissibility of Mr Faifer's expert report dated 30 March 2016. Before his challenge, I asked Mr VJV why Mr Faifer was not present. The need for Mr Faifer to attend had first been raised on the first day of the hearing and at the commencement of the second day of hearing Mr VJV said that he had not "been able to get hold of Mr Faifer". On the second day of the hearing Mr NSR said he believed he would need about two hours to cross examine Mr Faifer and that Mrs NSR would attend for cross examination by Mr VJV. Mr VJV had added that he would have two or three witnesses.

18 Mr VJV replied to my question that Mr Faifer did not say why, he just said that he was not available. I expressed my concern that the report carries less weight than it might otherwise carry, if the person who wrote it is not present for cross examination.

19 The Tribunal is slow to declare documents inadmissible although a similar result is often achieved when considering the weight that will be given to evidence of doubtful provenance.

20 Section 98(1) of the VCAT Act provides:

> (1) The Tribunal –
>
> (a) is bound by the rules of natural justice;

(b) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures;

(c) may inform itself on any matter as it sees fit;

(d) must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit.

21 Mr NSR objected to reception of Mr Faifer's report into evidence on the basis that placing any reliance upon it would tend to pervert the course of justice because it was, at least in part, based on false documents and was heavily dependent upon Mr VJV's opinion rather than Mr Faifer's.

22 I gave Mr NSR the opportunity to ask Mr VJV questions about the Faifer report.

23 Mr NSR asked who engaged Mr Faifer. Mr VJV said that he had done it himself both directly and through the Builder's then solicitors. Mr NSR asked if the report dated 30 March 2016 was the only report provided by Mr Faifer. Mr VJV responded that it was not. He said there was an initial report then this final report.

24 Mr NSR asked if the Schedule of Costs annexed to the report was prepared by Mr VJV or Mr Faifer. Mr VJV responded that Mr Faifer asked what materials were used and in what quantities, but then Mr Faifer fixed the prices. In answer to Mr NSR'S question, Mr VJV said that he provided all the documents upon which Mr Faifer relied in the production of the report. He said that he produced the documents referred to in the report itself, including the contract between the parties and at paragraph 2(5) of his report, Mr Faifer said:

> It is noted that I have not been on site but have relied on the information and documents provided to me by the Builder. The [Builder's] "Evidence of Completed Works" Report, 26 June 2015 (Appendix B) is particularly useful as it is a contemporaneous part photographic document.

25 Mr VJV said "the Faifer report relates directly to my documents – dollar for dollar".

26 Mr NSR tendered in evidence documents identified as R1. These were some of the documents filed by the Builder in response to the order for discovery. The pages numbered by the Owners 6 to 9 were quotations from Bellbird Building Supplies and they total $7,161.21. Mr NSR then tendered the documents identified as R2, which are a covering email and eight invoices. They total significantly less than the quotations, calculated by the Tribunal during the hearing as $3,895.70.

27 Mr NSR asked Mr VJV whether these were all the materials from Bellbird Building Supplies that were used in the course of this project. Mr VJV responded that this was possibly so. Mr NSR drew my attention to an email from himself to "sales" dated 10 May 2016 which was apparently to Bellbird Building Supplies. The relevant parts of the email are:

> Please find attached the quote sent from [the Builder] regarding the job at ….
>
> As discussed, [Mr] VJV … has sent through these quotes (with other account documents) to establish the value of the work he did in that job.
>
> I would like to know if these are legitimate quotes and, if so, what the actual value of the materials delivered was.

The response on the email was "8 invoice documents attached. Please direct all queries to our accounts department."

28 Mr NSR asked Mr VJV whether he agreed that there was a discrepancy between the quotations and the invoices for actual amounts paid. Mr VJV responded that Mr NSR was assuming that "I am the only person who has obtained materials" and denied there was a discrepancy, but did agree that he was not saying Bellbird Building Supplies had been paid $7,161.21.

29 I accept that the Builder has presented documents to the Tribunal and to Mr Faifer which do not accurately reflect amounts paid as distinct from quotations received.

30 Mr NSR then asked Mr VJV whether Mr Faifer had been provided with misleading information. Mr VJV denied that.

31 I asked Mr VJV why, if he had invoices, he provided the quotes instead. He said it was because the quotes indicated the quantities used. I explained to Mr VJV that the invoices are strong evidence of what occurred, whereas the quotations are weak evidence, because there was no certainty that he had bought those materials, either from Bellbird Building Supplies, or from anyone else.

32 Mr NSR then asked Mr VJV about pages 10 to 13 in exhibit R1. These pages appear to be invoices from CBS Cleaning & Building Services to the Builder, and it bears an ABN number. The invoices total $21,914.17. The first invoice is for $13,462.32 and has "paid" on the last page in handwriting.

33 Under cross-examination Mr VJV agreed that there is no entity called CBS Cleaning & Building Services, and that the ABN number is the Builder's. Mr VJV said that the information contained in the documents was correct while admitting that the documents were constructed by himself and a friend called James. I do not name this man, because he was not present to defend himself. Mr VJV seemed surprised that this obviously false document could be impugned. I remark that any false document taints the validity of any other document upon which it is based.

34 Because of the seriousness of the allegations concerning the CBS invoices, I record the cross examination of Mr VJV by Mr NSR that took place at approximately 12:30 PM on 4 December 2017:

> Mr NSR: Mr VJV, they are fake invoices are they not?
>
> Mr VJV: They are not fake invoices. They fit the actual description of a quantum meruit claim, which is a fictional claim.
>
> Mr NSR: So they're not fake, they're fictional. Is that what you are saying?
>
> Mr VJV: They are based on our quantum meruit claim that was put before the Tribunal, which is a claim in hindsight, of doing the job.
>
> Mr NSR: Turn to page 11 … there is a hand notation that says "paid" – did you write that?
>
> Mr VJV: Yes I did.
>
> Mr NSR: Did you pay an entity called CBS Building Services $13,462.32?
>
> Mr VJV: I paid James … James … is [who] the company is named after.

35 Mr NSR repeated the question about whether the Builder paid an entity called CBS Building Services. Mr VJV said that he had paid, but he had no banking records to support that because the value of work undertaken by James was paid for by work undertaken by the Builder for James on a "contra" basis.

36 I was and remain concerned that the director of the Builder would consider it reasonable to create a document, which allegedly supports facts sought to be proved by the Builder, purely for the purposes of the hearing.

37 Mr NSR said that the invoices filed by the Builder and others made available total $42,519.91. He said that if Mr Faifer's margin is applied that amount is $15,030.09; a total of $57,540.99. He asked Mr VJV how Mr Faifer could arrive at a total value of $93,000. Mr VJV did not answer the question.

38 I asked Mr NSR why the Owners did not obtain their own evidence from a quantity surveyor. Mr NSR replied that based on their assessment of their risk of liability for quantum meruit and the likely cost of engaging a quantity surveyor, they decided not to do so.

39 During the telephone hearing, Mr NSR asked Mr Faifer whether he was provided with documents which included quotations and invoices. Mr Faifer said that he did not have the materials in front of him, but what Mr NSR said sounded familiar. Mr NSR then asked how heavily these documents featured in Mr Faifer's expert report.

40 Mr Faifer said that he did not see the site and did not know precisely what was done or the quantities involved. He said he relied on Mr VJV's description, the invoices and the quotations.

41 Mr NSR asked Mr Faifer whether he was aware of the VBA report into defects at the property. Mr Faifer said: "I think so. I am not sure if I mentioned it and not sure if I saw it."

42 Mr NSR then asked if the report was based on the assumption that all specifications had been complied with. Mr Faifer responded that he had a discussion with Mr VJV and it was "mostly so". He said he understood that the Builder had completed the works in accordance with the contract.

43 Mr NSR asked Mr Faifer to whom he provided the report; whether to Mr VJV directly or to the Builder's then solicitors. Mr Faifer said it was to Mr VJV.

44 Mr NSR asked if the report date of 30 March 2016 sounded accurate and Mr Faifer responded that he thought that was right. Mr Faifer confirmed that his report include the following certification:

> I hereby certify that the observations, opinions calculations and extensions provided in this Report on the Quantum Meruit assessment of Quantities and Costs on the Alteration and Additions work carried out on the NSR Residence at …, are my own with consideration being given to the instructions received and my qualifications, experience and expertise in building and construction matters.

45 When asked by Mr NSR whether the assessment of quantities and costs were his own, Mr Faifer responded "As derived from documents and Mr VJV's instructions".

46 Mr NSR then asked Mr Faifer whether the report dated 30 March 2016 was the only report he had provided to which Mr Faifer responded "I believe so". When asked if there had been a draft provided, Mr Faifer replied:

> I can't remember – we spoke several times. I would have to go back [to my file] and check. I didn't speak to the solicitors, only to Mr VJV.

47 Mr NSR then tendered exhibit R3. He described it as an electronic copy of a report allegedly by Mr Faifer dated 28 March 2016, two days before the date of the report filed in the Tribunal. Mr NSR asked Mr Faifer whether this was his document. Mr Faifer responded: "It is possible, I spoke to [Mr VJV] many times".

48 Mr NSR asked about the incorrect characterisation of the VBA report as "confined to [defect] item 12" when an examination of the report would demonstrate that this is not accurate. Mr Faifer said: "I might have seen item 12 – I'm not sure". Mr NSR responded that he was happy to accept that Mr Faifer did not receive a copy of the report to which Mr Faifer responded that he could not answer, which I took to mean that he could not recall.

49 Mr NSR then referred to paragraphs 17 and 18 of the draft of 28 March 2016 which I reproduce in full:

> 17. The original contract sum is $57,550 (incl GST) however the Builder has now produced a priced schedule of works that were actually carried out inclusive of item, quantity, price rate and cost (inclusive of Supervision, Overheads, Contingency and Margin) totalling $96,963.87 (incl GST).
>
> 18. I believe that, notwithstanding that there are detailed Specifications and Plans and that the completed works can be viewed, the Builder himself is in the best position to quantify the actual works carried out as it is the Builder who has uncovered the existing conditions found at the time and knows of what works were actually necessary. However from an examination of the schedule I am of the opinion that the quantum of work is reasonable and that the price rates used are also reasonable.

50 No such statement was included in Mr Faifer's report of 30 March 2016.

51 Mr NSR said that the report dated 28 March 2016 was sent to him by a solicitor and copied to another, both of the Builder's former solicitors, on 1 April 2016 and the report dated 30 March 2016 was sent to him by the second solicitor a few days later. He assumed that the first report had been sent to him in error although Mr VJV appeared to believe that the Builder's former solicitors were not working in its best interests.

52 Mr Faifer said:

> The schedule is not my work. Instructions were given to me and when I looked at the plans and documents, the scope and rates appeared reasonable.

53 In re-examination, Mr VJV asked Mr Faifer whether, when undertaking the role of a quantity surveyor assessing quantum meruit, examination of the plans is a major part. Mr Faifer agreed that it was and also said he recalled receiving plans of the original layout and the as-built works from Mr VJV.

54 Mr NSR submitted that Mr Faifer, in his role as quantity surveyor, did not attend the site, but relied on information provided by Mr VJV about the extent and cost of work undertaken. He also said that Mr VJV provided a schedule to Mr Faifer and its exclusion from the final report gives a misleading impression. He said that given the questionable nature of the report and the documents upon which it relies, despite the broad discretion of the Tribunal, the admissibility of this particular document is a question of law, and it should not be admitted.

55 I asked Mr VJV whether he had any submissions in response and he said that he considered that there was no use in him being present, that the hearing was "a joke" and that the process would restart.

56 I ruled in the course of the hearing that given the artificial nature of some of the documents upon which Mr Faifer had relied in production of his report

and given the discrepancy between the reports dated 28 March 2016 and 30 March 2016, I would not accept it into evidence.

57 Mr VJV said that he believed the report was rejected on the basis that he obtained it personally rather than having the Builder's then solicitors instruct Mr Faifer. This is not the basis upon which the report was rejected and obviously cannot be in the Tribunal, where so many people are self – represented, and companies are often represented by people, such as directors, who are not professional advocates. The report was rejected on the basis of information that was provided to the Tribunal in the course of the hearing on 4 December 2017 and not before.

58 I remark that had Mr Faifer been present to be cross-examined on the report, I would have allowed this to occur and hence the report might have been in evidence. Mr Faifer's telephone evidence could have assisted the Builder, but did not because Mr Faifer did not have the relevant documents in front of him and his recollection of the report was incomplete.

59 In the alternative I find that the probative value of the Faifer report is so low that even if admitted it would not be taken into account.

60 I do take into account the document entitled "Evidence of Completed Works" dated 26 June 2015 which was produced by the Builder. I treat it as a statement of evidence rather than an expert report. Although Mr VJV might qualify as an expert in a proceeding in which neither he nor his company are parties, he does not qualify as an expert in this proceeding where he cannot fulfil paragraphs 8, 9, and 10 of practice note PNVCAT2: Expert Evidence:

> 8 An expert witness has a paramount duty to the Tribunal and not to the party retaining the expert.
>
> 9 An expert witness has an overriding duty to assist the Tribunal on matters relevant to the expert's expertise.
>
> 10 An expert witness is not an advocate for a party to a proceeding.

MR VJV'S DEPARTURE FROM THE HEARING

61 As mentioned above, Mr VJV expressed his intention to leave the hearing on the third day, just after I ruled that Mr Faifer's report would not be accepted into evidence. I said that I would end the hearing upon his departure and urged him to wait to consider whether seeking leave to appeal (as he had foreshadowed) is necessary upon receipt of my decision. I had heard and read evidence from both parties and Mr NSR confirmed that he had closed his case. I brought the hearing to a close and left the hearing room while both parties were still present. I had no further communication with either party after the end of the hearing.

62 The hearing came to an end before Mr VJV had cross-examined the Owners concerning the VBA report and before Mr NSR had cross-examined Mr VJV concerning the Builder's report.

63 Mr NSR and Mr VJV both filed Statements of Evidence dated 28 July 2017, but neither cross-examined the other on his statement. I take cautious note of the evidence in both statements.

CONTRACT

64 It appears to be in the form of the HIA Victorian Alterations, Additions and Renovations Contract, published by HIA Contracts Online, based on the January 2011 paper version.

65 The Builder prepared most of the drawings and the specifications. Some of the difficulties between the parties appear to rise from allegations by the Owners that the final drawings and specifications were inconsistent with earlier discussions and documents.

66 The parties agree that Mr NSR prepared some sketches for work to the garage and they were incorporated into the contract along with plans and specifications prepared by the Builder.

Time

67 The parties agree that the contract allowed for work to be completed within 60 days of the commencement date and they also agree that the commencement date was 8 April 2015. Without extensions of time, the work should have been finished by 8 June 2015. The parties agree that the Notice of Completion was issued by the Builder on 7 July 2015.

Provisions for termination

68 Clause 46 is entitled "Owner's right to end this Contract". It provides as follows:

> 46.0 If the Builder breaches (including repudiates) this Contract, nothing in this Clause prejudices the right of the Owner to recover damages or exercise any other right or remedy.
>
> 46.1 The Builder is in substantial breach of this Contract if the Builder:
>
> - suspends the carrying out of the Building Works otherwise than in accordance with Clause 38;
> - has the Builder's licence cancelled or suspended; or
> - is otherwise in substantial breach of this Contract.
>
> 46.2 If the Builder is in substantial breach of this Contract the Owner may give the Builder a written notice to remedy the breach:
>
> - specifying the substantial breach;
> - requiring the substantial breach to be remedied within 10 Days after the notice is received by the Builder; and

- stating that if the substantial breach is not remedied as required, the Owner intends to end this Contract.

46.3 If the Builder does not remedy the substantial breach stated in the notice to remedy the breach within 10 Days of receiving that notice, the Owner may end this Contract by giving a further written notice to that effect.

46.4 The Owner is not entitled to end this Contract under this Clause when the Owner is in substantial breach of this Contract.

69 As I said recently in *Larsson v Priftis*[2]:

> 177 The two contracts, like most standard-form building contracts, include a two-stage system to end the contracts. The first is commonly known as a "show cause" notice. That is, a notice is sent by the "innocent" party setting out the other party's alleged breaches. The party who receives the notice must then either act in accordance with the notice or show cause why the contract should not be ended. Stage 2 is termination of the contract by notice given some days later – under the first contract the period was 10 days; under the second contract, five days.
>
> 178 Such clauses minimise unfairness between parties and force any party inclined to act hastily to stop and think.

END OF THE CONTRACT

70 As mentioned above, both parties claim that the other has repudiated the contract. An early mention of repudiation is in a letter from the Builder to the Owners of 21 June 2015 stating in part:

> I refer to your email dated June 8 copy below, which clearly defines that we had no dispute at that point …
>
> To that point all contract items, variations, specifications, scope of works had been carefully considered at your own admission and tabled to us as to "what work was left to make sure that nothing was missed".
>
> All of your latest points and claims are in direct conflict and contradict yourself.
>
> [There followed an email from Mr NSR to Mr VJV of 8 June 2015.]
>
> I have lost faith in these matters being resolved amicably. It's clear you are trying to paint a "picture" of me being dishonest in my dealings and of being a liar?
>
> Due to your failure to pay your requested & agreed variations in accordance with the contract and your refusal to be bound by the contract terms & conditions, we believe that you may have repudiated the contract. We may choose to accept your repudiation & we reserve all our rights including a right to a Quantum Meruit claim.

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2 [2017] VCAT 2130, paragraph 177 and 178

> You'd be well advised to check your facts before you start painting such a defamatory picture of me.
>
> You are having a profound negative impact on my health and welfare of my family.

71 The Builder filed Amended Points of Claim dated 20 April 2016 ("APoC"). It describes the dispute between the parties from paragraphs 8 to 21.

72 The APoC allege that the dispute commenced on or about 3 June 2015 when the Owners issued a notice by email threatening legal proceedings due to their "annoyance" that the Builder had "issued an invoice for minor variations requested by the [Owners]".

73 The Owners' Points of Defence and Counterclaim dated 30 May 2016 commences with Points of Defence ("PoD"), then recommences numbering for the Points of Counterclaim ("PoCC"). It stated that the Owners first put the Builder on notice of concerns on 3 June 2015 and that the issues went beyond "annoyance". In particular, as Mr NSR said at the hearing, according to the Owners, the Notice of Completion issued by the Builder was not legitimate and the Builder knew that. Mr VJV's evidence at the hearing was that there were minor defects which the Builder was willing to rectify.

74 The email of 3 June 2015 is in response to an earlier one from Mr VJV to Mrs NSR asking for information about the trough tap, for which it was clear that the Builder considered the Owners were obliged to pay. Mr NSR'S response commences:

> The installation of a mixer tap with a rinsing spray hose was part of our pre-contract discussions and the inclusion of it was presumed by us when entering into the contract. Are you seriously trying to say that we asked you to install a wash basin with no provision to actually use it?

75 The email also included references to items which the Owners considered were cheaper than allowed for in the contract, but to which they had made no objection.

76 My attention was not drawn to any provision of the contract that called for installation of a tap at the trough. Further, Schedule 6 of the contract lists "excluded items" as:

> Robe & Bedroom floor coverings. Any item(s) not detailed in the contract documents.

77 At paragraph 9A of the PoD the Owners stated that Mr NSR and Mr VJV met on the building site on 5 June 2015 and made various verbal agreements. They allege that they agreed to waive the Builder's obligation to deliver certain building works in accordance with the Builder's contractual obligations, provided that specific building works were completed. They said that the parts of the works agreed to be waived were deficiencies in the finish to all the natural timber installed under the

Contract and Mr NSR told Mr VJV that he would remedy those deficiencies himself. They also claim that the Builder agreed not to pursue payment for any amount over the contract price for what they describe as "so-called variations".

78 The Builder alleged that it had asked for a list of "everything required" to complete the works and the contract to the Owners' satisfaction, to which the Owners responded on 8 June 2015. The Builder claims that the letter admitted the Owners had interfered with the works by sanding, punching and filling feature timber work installed and finished by the Builder. This work allegedly included the "cellar door".

79 The Owners agree that they undertook work on the natural timber finishes but said they did so in accordance with the agreement of 5 June 2015 and deny that it was a breach of section 19 of the DBC Act. They also deny that it caused any damage.

80 The Owners and the Builder are at cross purposes about whether the Owners provided the Builder with information about "everything required". The Owners say they did so in the on-site conversation on 5 June 2015.

81 The Owners allege at paragraph 10A of the PoD, that the Builder breached the verbal agreement of 5 June 2015 by issuing an invoice dated 11 June 2015 to which it was not entitled, for "purported variations". If either party filed a copy of the invoice, neither drew it to my attention, but according to Mr NSR'S witness statement of 28 July 2017, it was for $995 for variations that had not been documented in accordance with the contract.

82 The Owners allege that delivering the variation invoice amounted to evincing an intention not to be bound by the agreement alleged to have been made on 5 June 2015, in consequence of which the Owners were also entitled to regard themselves as not bound by that agreement.

83 The Owners allege at paragraph 10C of the PoD that they gave the Builder notice of the following alleged deficiencies on 15 June 2015:

- the "cellar door";
- the bathroom tiling;
- the rear garage storage shelves; and
- the bathroom lighting.

84 The Owners also say that they reiterated those claims on 16, 23 and 25 June 2015. I accept Mr NSR'S evidence that the Owners paid the Builder $11,510 in two payments on 12 and 15 June 2015 in circumstances where they did not believe that they were obliged to do so, but according to their email of 15 June 2015:

> However, I do not know your personal financial circumstances and do not want your lack of cash flow to be the reason that you are unable to meet your further commitments under the contract.

85 The Builder alleges that it finished the works, and on 26 June 2015 issued a "Notice of Completion" under clause 39 of the contract.

86 At paragraph 13 of the PoD, the Owners dispute that the Builder had completed the works in accordance with its statutory and contractual obligations. Their particulars concern 16 items of which a. to m. and p. to r. commence: "The Applicant cannot prove …" . Paragraphs n. and o. commence "The Applicant caused damage to …". Each paragraph, a. to r., ends: "… and furthermore the Respondents deny the fact alleged". Each of the 16 items is referred to in the VBA report.

87 Paragraph 14 of the APoC alleges that the Builder issued the Certificate of Final Inspection (I note that this certificate was "issued" not by the Builder, but by the Relevant Building Surveyor – "RBS") and the Final Claim on 1 July 2015. The Builder alleges that the Owners failed to meet with the Builder to compile a defects list within 7 days of receiving the final claim.

88 It is noted that these items were not in contention between the parties when the Owners sent their Notice of Termination of Contract.

89 At paragraph 14 of the PoD, the Owners say that the Builder unlawfully delivered a Certificate of Final Inspection and Final Claim, particularly because the fireplace and its flue were illegally and defectively installed, and the new toilet was not properly ventilated. These are pleaded in detail at paragraph 6. They also refer to the 16 items in paragraph 13 of the PoD.

90 In his statement of 28 July 2017, Mr NSR said at paragraph 18:

> Under clause 39.0 of the building contract, a Notice of Completion is given to the Owner "[w]hen the Builder considers that the Building Works have reached completion". Given the obvious deficiencies in the building work which [the Builder] was aware of, there was no reasonable basis upon which [the Builder] could "consider that the Building Works have reached completion".

91 Paragraph 16 of the APoC alleges that on 7 July 2015 the Owners sent a letter entitled "Notice of Termination of Contract", which purported to end the contract immediately. They plead later that the Owners were not entitled to do so.

92 The Owners agree that they served the Notice of Termination of Contract by an email of 2:09 AM on 7 July 2015, but deny that they breached the contract or demonstrated any intention to breach the contract.

93 With the exception of the formal parts, the Notice of Termination of Contract is as follows:

1. On 26 June 2015 the Builder served, by email and by leaving a copy at the Owners address, a document purporting to be a "Notice of Completion".
2. On 1 July 2015 the Builder served a "Final Claim" by email.

3. The Owners consider the following circumstances to be a repudiation by the Builder of the Contract:

    3.1 By letter dated 16 June 2015, as further elaborated through various letters and emails from then until the Notice of Completion the Builder has been aware that the Owners consider a number of aspects of the Building Work to be deficient or incomplete, and the Builder has evinced an intention to not remedy any of the deficient Building Work.

    3.2 The Builder has evinced an intention to not attend to, or remedy, any other deficiencies in the Building Work. Evidence of this is the failure of the Builder to seek to attend a final inspection, as required by clause 39 of the Contract and the Builder has evinced an intention to not be prepared to attend such an inspection by delivering a Final Claim requiring payment within 7 days.

4. The Owners accept the Builder's repudiation of the Contract and terminate the Contract with effect from the earliest occurrence of:

    4.1 Actual notice of delivery of this Notice of Termination of Contract; or

    4.2 Deemed notices of delivery of this Notice of Termination of Contract pursuant to clause 6 of the Contract.

5. On the date of this Notice, consequent to the termination of the Contract, the Owners have taken possession of the Land and the Owners have removed the keys to the property from the outside location where the Builder has been storing them.

6. The Owners will be seeking the appointment of an Inspector under s44 of the *Domestic Building Contracts Act 1995*. Should the inspector determined that all Building Work has been carried out in accordance with the specifications of the Contract and the Builder's statutory obligations, the Owners will immediately make the final payment due and payable under the Contract. Alternatively, If the Inspector determines that there are deficiencies in the Building Work, the Owners will seek to have the cost of, and incidental to the remedy of, those works deducted from the Contract Price.

94 Particular d to paragraph 17A of the PoD states, among other things, that the inspector produced a report on 21 September 2015 which identified 17 breaches of the Builder's "statutory and contractual obligations."

95 On 14 July 2015 the Builder's then solicitors wrote to the Owners. The relevant parts are:

We note the following:

1. On 1 July 2015, our client issued its final claim pursuant to clause 39.1 of the contract.

2. In breach of clause 39.2 of the contract you failed to meet with our client within 7 days of receipt of the final claim.

3. By way of letter entitled "Notice of Termination of Contract" dated 7 July 2015 (purported Notice of Termination), you purported to immediately and unilaterally terminate the contract.

4. Your purported termination of the contract was in breach of the contract, unlawful and by reason of your conduct you have evinced an intention not to be bound by the terms of the contract and have therefore repudiated the same.

5. Our client vehemently denies the allegations set out in the purported Notice of Termination. Further, even in the event that our client had been in breach of the contract as set out in the purported Notice of Termination (which is denied), you failed to provide our client with a written notice to remedy the alleged breaches (which [breaches] are denied) in accordance with clause 46.2 of the contract.

6. Further to the above, [your] purported Notice of Termination asserts that "consequent to termination of the Contract, the Owners have taken possession of the Land and the Owners have removed the keys to the property from the outside location where the Builder has been storing them". We are instructed that you in fact took possession of the Land prior to this date and our client has previously provided you with evidence in support of this claim.

7. Our client hereby gives you notice that it accepts your repudiation and terminates the contract.

8. By reason of your conduct set out in this letter and your repudiation of the contract our client has suffered loss and damage.

96 Two aspect of the letter are somewhat disingenuous concerning notes 2 and 6.

97 Note 2 criticises the Owners for failing to meet within seven days, but the contract does not allocate responsibility for arranging the meeting. Further, the meeting was to take place within seven days then payment was to be made within a further seven days. Demanding payment seven days from the notice did not contemplate that the meeting would take place.

98 Note 6 discusses the Owners re-taking possession of the "Land", which is not surprising in circumstances where the Notice of Termination of Contract said that is what the Owners had done. However, the parties agree that the Owners continued to live in the part of the home that was not the subject of the contract, and although the Builder alleges that the Owners re-took possession earlier than 7 July 2015 - perhaps as early as 8 June 2015 - Mr VJV said, in answer to my question, that there was never a request for exclusive possession of any part of the land in accordance with clause 28 of building contract.

99 I find that the relevance of note 6 is the necessary implication that on 7 July 2015 the Owners excluded the Builder from access to the site.

Repudiation

100 As I said in *Larsson v Priftis*:

> 171 A definition[3] of contractual repudiation commences:
>
> > Conduct that evinces an unwillingness or an inability to render substantial performance of a contract. It is conduct that evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with one's obligations and in no other way.
>
> 172 In *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61, Chief Justice Gleeson, together with Justices Gummow, Heydon and Crennan, described classes of repudiation, the first being "renunciation" of the contract (as described in the above definition), and they said at paragraph 44:
>
> > The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it.
>
> 173 The second category, which their Honours described as overlapping renunciation, is failure to perform. They said that it might not even be a breach of an essential term but must manifest:
>
> > …unwillingness or inability to perform in such circumstances that the other party is entitled to conclude that the contract will not be performed substantially according to its requirements.[4]
>
> 174 In her final submissions the Owner quoted Brennan J. in *Laurinda Pty Ltd v Capabala Park Shopping Centre* [1958] HCA 23, at paragraph 14 where his Honour said:
>
> > Repudiation is not ascertained by an enquiry into the subjective state of mind of the party in default; it is to be found in the conduct, whether verbal or other, of the party in default which conveys to the other party the defaulting party's inability to perform the contract or promise or his intention not to perform it or to fulfil it only in a manner substantially inconsistent with his obligations and not in any other way.

101 At paragraphs 19 to 23 of the APoC the Builder alleges that by purporting to end the contract by a single notice, rather than taking the contractual steps of issuing a show cause notice then terminating, the Owners repudiated the contract, which was accepted by the Builder on 14 July 2015, therefore entitling the Builder to quantum meruit rather than the amount it would otherwise be entitled to under the contract.

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3 Australian Legal Dictionary, Lexis Nexis, 2nd edition

4 Paragraph 44

102 At paragraph 18 of the PoD the Owners say:

> The Respondent dispute that clause 46.4 requires strict and specific written notification under that clause to end the Contract

They go on to dispute that the termination was unlawful and they deny any intention not to be bound by the contract.

103 The Owners agree, at paragraph 21 of the PoD that the Builder purported to accept a repudiation, but they deny that there was a repudiation.

104 The Owners allege in the counterclaim that the Builder repudiated the contract. They say at paragraph 2 that the Builder knew, at the time it delivered a Notice of Completion, on 26 June 2015, that it had not met all its contractual and statutory obligations "including its knowledge of criminal behaviour". The alleged criminal behaviour was that the Owners say that the wood burning fireplace and fireplace flue included in the Builder's work was required to be undertaken by a person registered as a plumber and that the work was not undertaken by such a person.

105 The Owners refer to s221D(1) of the *Building Act 1993* ("Building Act") which provides:

> (1) A person must not carry out any plumbing work of a particular class or type unless he or she is licensed or registered by the Authority to carry out work of that class or type.

106 At paragraph 3 of the PoCC the Owners allege that by delivering the Notice of Completion, the Builder evinced an intention not to be bound by the terms of the contract and therefore repudiated the contract.

107 The Owners also plead at paragraph 4, that the Builder further repudiated the contract on or about 30 June 2015 when it obtained a Certificate of Final Inspection and delivered a Notice of Final Claim.

108 The Owners say the Certificate of Final Inspection was unlawfully issued both because of the alleged failure to have the wood heater and fireplace flue installed by a plumber and also because the new toilet did not have ventilation compliant with the Building Code of Australia.

109 There is no evidence that the Builder has been prosecuted for these alleged illegalities. The Builder pleads that any allegation concerning the Certificate of Final Inspection being issued unlawfully is a matter between the Owners and the RBS, not between the Owners and the Builder.

110 To the degree that the Builder's works were illegal, this could have arisen from inadvertence or deliberate illegality. I am not satisfied that, to the degree that the Builder's works were illegal – and I make no finding whether or not they were - Mr VJV was aware of that on behalf of the Builder. Neither of the allegedly illegal works were complained of at the time the Owners ended the contract.

111 At paragraph 6 of the PoCC the Owners allege that a claim for $170 for an "Increase WIR Height" for an alleged variation is an unlawful claim on the

basis that it was either a prime cost claim that it was not entitled to make (and therefore a breach of s22 of the DBC Act and a criminal offence), or a demand for money in excess of the contract price and therefore a criminal offence under s16.

112 At paragraph 8 of the PoCC the Owners pleaded that their notice of 7 July 2015 accepted the Builder's repudiation of the contract and terminated the contract.

Conclusion regarding repudiation

113 The Owners submitted that they could properly end the contract other than in accordance with the two stages, but I am not satisfied that they could in this proceeding, other than based on repudiation by the Builder.

114 The parties agree that at the time the Builder issued the Notice of Completion and Final Claim, the four items in contention between them concerned the cellar door, bathroom tiling, garage shelving and bathroom lighting. As Mr VJV said, it is a serious step to terminate a building contract and the if Builder was in breach, it was not in substantial breach concerning these four items.

Alleged defects

115 To the extent that the Builder's allege repudiation depends on the four listed items, I find below under "Alleged defects" that two of those items are in breach of the contract, but I also find them to be of insufficient severity to support a finding of repudiation.

116 In this respect I have regard to *Koomphatoo*: was the Builder renouncing either the contract as a whole, or a fundamental obligation under it?

117 None of these items are structural or otherwise likely to endanger health and the total sum that the Builder must allow to the Owners for them is no more than a few hundred dollars.

118 The fireplace was not one of those items, but I accord it greater importance.

119 For the reasons discussed in greater detail below under "Fireplace", I am satisfied that Mr VJV, and through him the Builder, knew that at least the fireplace installation was defective, but insisted the work was complete and that the Builder was entitled to payment.

120 Clause 39.0 of the building contract provides:

> When the Builder considers that the Building Works have reached Completion the Builder is to give to the Owner:
>
> * a Notice of Completion; and
>
> * the Final Claim.

121 Although Mr VJV indicated that he did "consider" the works had reached completion, I find the standard is objective rather than subjective. The standard is that of a reasonable builder in Mr VJV's position.

122 In Sumic v Muzaferovic[5], Senior Member Walker said:

> Termination on an invalid ground may nonetheless be effective if at the time of termination, there were a valid grounds for termination, even if the innocent party had been unaware of it.

123 Had the alleged illegalities, the defective chimney and the lack of ventilation to the toilet, been of sufficient severity to evince an intention on the part of the Builder not to be bound by the contract, the fact that they were not raised at the point where the Owners purported to terminate for the Builder's repudiation, might not have been fatal to the Owners' argument. However I am not satisfied that even these defects carried that severity.

Alleged failure to arrange the final inspection

124 As to the allegation that the Builder did not arrange a final inspection before issuing the Notice of Completion, I am not satisfied that it was obliged to do so. Clause 39.2 provides:

> The Builder and the Owner must meet on the Building Site within 7 Days of the Owner receiving the Notice of Completion and Final Claim to carry out an inspection in accordance with clause 40.

125 At 2:09 AM on 7 July 2015 the Owners had sent the Builder the Notice of Termination of Contract which included, at paragraph 3.2 "failure of the Builder to seek to attend a final inspection, as required by clause 39".

126 As indicated by the emails at OTB 21, after receipt of the Notice of Termination, the Builder invited the Owners to a defects meeting by an email sent to the Owners at 12:33 PM on 7 July 2015. While not raised before me, 7 July was arguably within 7 days of 1 July, although I note that trying to arrange the meeting on the last possible day meant that the parties would not have met within the seven days. Further, the invitation seems to be a reaction to the Notice of Termination.

127 Mr NSR responded at 2:48 PM the same day, rejecting the meeting, and referring to the Notice of Termination. The email states in part:

> In relation to those items which have been subject to dispute, your position is summarised at page 4 of your letter sent to us by email on 24 June 2015:
>
> > "There are no deficiencies in the works you have listed or any of the works we have carried out."
>
> If you are correct, then you have completed the Contract in accordance with your obligations and we are obliged to pay you in accordance with the Contract.
>
> If you are wrong, then your clear rejection of our asserted defects and incomplete work is a repudiation of the Contract; which we have accepted.

---

5 (Domestic Building)[2013] VCAT 1862 at paragraph 241, having regard to the decision of the High Court of Australia in *Shepherd v Felt and Textiles of Australia Ltd* [1931] HCA 21

128 The question of who repudiated the contract is by no means simple and straightforward. The actual breaches were of low value but from one point of view, the Builder repudiated the contract right at its end by seeking payment while refusing to rectify the last few matters and without allowing for inspection. Had the Owners taken the two-stage route to termination, and had the Builder failed to cooperate, the Owners' termination would have been unassailable.

129 I am satisfied, on the balance of probabilities, that the Owners repudiated the contract, which entitled the Builder to terminate the contract and claim quantum merit. As found above, I do not rely on the Faifer report. In *Sopov & Anor v Kane Constructions Pty Ltd (No 2)* [2009] VSCA 141 the Court of Appeal said:

> The [contract] price is merely a piece of evidence, showing what values the parties attributed – at a particular time – to the work which the builder was agreeing to perform.

130 It is the only credible evidence of price before me and therefore under s53(1) of the DBC Act, which provides:

> VCAT may make any order it considers fair to resolve a domestic building dispute

the Builder is entitled to the contract sum as adjusted for variations, less the cost to it of undertaking repair of any defective work.

131 In the absence of better evidence, I allow two thirds of the amount that I would have allowed if the Owners had been entitled to recover the cost to them of having the work done.

VARIATIONS

132 Good fences make good neighbours, and good documentation makes good building projects. This is exemplified in paragraph 42 of the Owners' letter to the Builder of 15 June 2015:

> Whilst there have been collaborative discussions and changes to the Building Works which have been mutually agreed between the Owners and to the Builder, there have also been unilateral decisions made by the Builder which were not discussed or authorised.

133 In its PoC, the Builder has relied entirely on its allegation that the contract was repudiated by the Owners and therefore it is entitled to quantum meruit. It has not pleaded in the alternative that there are variations to which it is entitled. However, as mentioned above, at the commencement of the hearing on 14 September 2017, Mr VJV handed up a document headed Builder's Variation List, listing 54 alleged variations.

Contractual and statutory requirements

134 Clause 26 of the building contract concerns requested variations. The relevant subclauses are:

26.0 Either the Owner or the Builder may ask for the Building Works to be varied. The request must be in writing, must be signed and must set out the reason for and details of the variation sought.

26.1 If the Owners request the variation and the Builder reasonably believes the variation will not require a variation to any permit and will not cause any delay and will not add more than 2% to the original Contract Price the Builder may carry out the variation.

26.2 If the Builder requests the variation, the notice given by the Builder must state the following further particulars:

* what effect the variation will have on the Building Works;
* if the variation will result in any delays, the Builder's estimate of such delays; and
* the cost of the variation and the effect it will have on the amount payable by the Owner under this contract.

135 I note that clause 26.0 does not allow for verbal variations. Regardless of the fact that the Builder may undertake a variation sought by the Owners in certain circumstances, there is still a requirement for the Owners to have made the request in writing. It is important to comply with the contract, which is substantially the same as sections 37 and 38 of the DBC Act, because having written evidence of a variation prevents later argument about whether work which is not in strict compliance with the original design has been varied or is in breach of the contract.

136 The Builder's Variation List includes in its legend how the various variations were communicated between the parties. None were by letter. Ten are marked "E" meaning by email or SMS and the remaining 44 are shown as "V", which is verbally.

137 No details of the alleged variations is given such as date, work to be done and any price, agreed or otherwise. Where the variations are alleged to be electronic, copies of the email or SMS have not been provided by either party. In the letter of 15 June 2015, the Owners allege that no variations have been executed in accordance with clause 26.0.

138 On the first day of the hearing, Mr VJV said that the approximate value of the variations was $35,000 and they had been costed by Mr Faifer. Mr Faifer's report did not cost the alleged variations other than to the degree that any of them were included in the report concerning quantum meruit. His report did not distinguish between the work as contracted for and the work as built. When Mr VJV gave that evidence I remarked that Mr Faifer would need to attend to give evidence.

139 Mr NSR said it was the Owner's position that there were no discussions about costs unless they were included in an SMS or email. He asked if Mr VJV could say which variations involve discussions concerning cost. Mr

VJV said that other than the disputed invoice for $440 no specific charge was made for variations and they are now part of the quantum meruit claim.

140 Mr NSR responded that if it was Mr VJV's position that the variations were to the value of $440, he would accept that. Mr VJV did not say that was the Builder's position, but I note that the claim for variations in the Final Claim was $440.

141 In their email letter of 15 June 2015 the Owners also mention variations that apparently were undertaken. They are: painting of lounge and dining window frame; increase in robe height; tiling around the mirror in bathroom; three extra double power points to lounge and tiling under stairs.

142 Some of the items claimed as a variation by the Builder have been described by the Owners as deficiencies in the contract. For example, variation 13 is claimed by the builder as "Fireplace 360° granite slabs in lieu of tiles to match kitchen and entry". According to the Owners in their letter of 15 June 2015, the parties always intended the fireplace to be granite however the Builder had included tiles in the Scope of Works which was changed and initialled to stone in one place, but not everywhere.

143 The Owners also allege that some of the variations claimed by the Builder, were not variations at all but breaches of the contract. For example, variation 29 is "Cellar internal lining Plaster board requested while in progress in lieu of butt jointed ply sheeting". The Owners say that they always wanted ply sheeting and that use of plasterboard is a breach of the building contract.

144 It is unfortunate that the parties tended to disregard the requirements of the building contract. A failure to ensure that matters from which disputes can arise, such as variations and extensions of time are in writing, is not a mark of friendship between builders and owners but weak points in their contractual relationship which can lead to unnecessary disputes. Both parties mentioned that it had been their intention to "collaborate" with any changes, and unfortunately poor documentation has been to the disadvantage of both. I criticise both Mr VJV, as a professional builder, and Mr NSR, who is a solicitor.

145 My task in considering the variations has been made difficult because the parties did not take me through them in detail.

146 In the absence of better evidence I allow variations of $440 in favour of the Builder.

ALLEGED COMPLETION

Builder's view

147 Mr VJV gave evidence that the work had reached completion, the Owners took possession and the relationship between them broke down. He said that the Owners never completely moved out of the home, they just moved to a different part and at the end of May 2015 they moved back in. He said

that he contemplated that the Builder would carry out any items requiring completion and that was limited to a little make-good work.

Owners' view

148 Mr NSR said that the Owners decided to get the report under s44 of the DBC Act and rely on that. He said the only item in contention other than the items mentioned in the report is the hanging rail in the garage.

THE OWNERS' CLAIMS

Delay

149 As the Court of Appeal said[6] in *Sopov,* with respect to whether the contract continues to have an influence over quantum meruit for variations and delay costs:

> …we do not think that this view can be sustained. It is because the quantum meruit remedy rests on the fiction of the contract's having ceased to exist ab initio that the contract can have no "continuing influence" when the value of the work is being assessed on a quantum meruit. It is because this alternative remedy does ignore the bargain which the party struck, and does ignore the rights accrued under the contract up to the date of termination, that the availability of quantum meruit in the alternative is now seen as anomalous.

150 The Owners are not entitled to damages for delay, including agreed damages. I make no allowance for them.

Alleged defects and incomplete items

151 The amount sought by the Owners for rectifying alleged defects and incomplete items is $7,411.

152 Because I have found that the Owners repudiated the contract, the amount I deduct for any items found to be defective or incomplete is the amount that I find it would have cost the Builder to complete the work

153 I characterise these sums, not as damages to which the Owners are entitled, but necessary deductions to establish the value of the work received by the Owners.

Fireplace

154 The Owners referred to item 7 of the VBA report which states in part:

> 2. Observations at the time of the inspection revealed that the flue to the fireplace has not been installed with a barrier to prevent the blow-in insulation from falling from the ceiling space onto the flue and top of the fireplace. At the time of the inspection it was also observed that the flue to the fireplace had been installed hard against an adjacent roof truss.

---

6 Paragraph 21

3. a. It would be considered good building practice that the flue and fireplace would be installed so as to prevent insulation from being able to come into contact with the flue and fireplace.

   b. 3.7.3.4 of the BCA states in part that an insert fireplace and flue must comply with the following:

      i. There must be a clearance of 50 mm between the outer flue and adjacent materials.

4. As the flue and fireplace had not been installed in a manner to prevent insulation from coming into contact and the flue had been installed without a clearance of a minimum of 50 mm to any adjacent surface, a defect is noted.

155 In his statement of 28 July 2017, Mr VJV said that this item was one of two matters in the inspection report "requiring attention" and continued:

> The 50 mm required clearance of the fireplace flue in relation to the timber roof trusses in the ceiling cavity, of which required the Owners to purchase 2 x 45 degree 20 "elbow" flue is to enable the proper installation. [sic]

156 There are documents at OTB 27, 28 and 29 concerning the fireplace. The documents at OTB 27 show that the Owners purchased the Jetmaster fireplace insert together with screens, a flue kit and extra lengths of flue from Hallam Heating.

157 OTB28 is VBA Technical Solution Sheet 7.01 concerning solid fuel heaters. On page 1 the sheet includes:

> The installation of a SFH is classed as Mechanical Services work because it involves the heating of a building.
>
> Only persons registered and/or licensed in mechanical services are permitted to install a SFH.

158 The documents at OTB 29 are a tax invoice for Mr Hans Dudink, plumber, directed to the Builder, and the VBA practitioner verifications for Mr Dudink showing that he was licensed at the time of the work for 12 different classifications within plumbing, but not for mechanical services.

159 Mr VJV said that the Owners did not supply all aspects of the kit necessary to install the heater. He said that in addition to the material at hand he needed two elbows and a flat ceiling plate, but when he telephoned Hallam Heating, they said they had not been paid.

160 Mr VJV said that he agreed the fireplace had not been installed properly but said it was a breach by Mr Dudink who, he agreed, was engaged by the Builder. Mr VJV said that the fireplace was not mentioned in an email to him by the Owners of 8 June 2015, but I cannot be satisfied that they were aware of the problem by that date. There is an email from Mr NSR to the RBS dated 1 July 2015 which includes the following:

> Part of the works included the installation of an open wood fireplace and down-lights. The installation of the fireplace has not placed any barrier against the blow-in insulation being able to fall down onto the firebox from drafts or other disturbance. The installation of the down-lights has also not had any barrier to the insulation coming into contact with the lights. I have attached photos of the relevant works.
>
> Can you please confirm that this does not create a fire hazard, or is otherwise a problem which should have been picked up in the final inspection?

161 The RBS responded on 2 July 2015 as follows:

> * the two new LED's down-lights installed appear to have sufficient clearance around the fittings.
>
> * the installation of the fireplace is generally is [sic] required to be installed in accordance with the manufacturer's specification and clearance around the penetration of the flue. The fireplace is generally is [sic] required to be installed by a licensed plumber and is exempted from requiring a building permit under schedule 8 of the building regulations 2006. Most fireplace flue kits are double or triple skin that require minimal clearance.
>
> I can raise this matter with Mr VJV (builder) as the builder if you like and to ensure that it is installed in accordance with the manufacturer's specification.
>
> In light of the above it appears to be installed in accordance with the manufacturer's specification and I hope it is sufficient.

162 On 3 July 2015, Mr NSR sent an email back to the RBS saying:

> Thank you for your response. I don't need you to raise the matter with Mr VJV. Your explanation has addressed my concern that these things might be a fire hazard. I will check with the manufacturer of the fireplace just to be sure.

163 I have not seen evidence that the Owners were aware of the potential problem before 1 July 2015. Mr VJV appears to have concluded that Mr NSR'S response to the RBS was legally or morally questionable. I take it at face value; that Mr NSR was reasonably satisfied by the response, but was still going to undertake his own researches.

164 In apparent contradiction of his statement that he was unaware of any defects in installation of the fireplace, Mr VJV said that Mrs NSR delivered the fireplace "during the school holidays". As the document at OTB 27 shows that it was collected on 20 April 2015, this appears to be accurate. However, Mr VJV went on to say that he told Mrs NSR that in addition to the items supplied, there was a need for two elbows to avoid an obstruction in the chimney area. Mr VJV said that Mrs NSR asked how much the elbows would cost and he said $330 for each elbow. According to Mr VJV, Mrs NSR said she would speak to her husband and get back to him, but she

failed to do so. Mr VJV said that three or four weeks later he had the plumber install the flue to enable the Builder to complete the work.

165 On the basis of Mr VJV's evidence that he sought elbows before the heater was installed, I conclude that Mr VJV knew that the materials for the flue were insufficient given the configuration of the chimney space, but allowed the plumber to go ahead with the installation in any event.

166 However, I accept Mrs NSR'S evidence, in answer to my question, that there was never any discussion with her about the need for elbows or a ceiling plate. She agreed that the Owners were to supply everything necessary for the installation of the fireplace and that the Builder was to do or arrange the work.

167 I remark that there was no evidence before me that the fireplace as constructed is a fire hazard. I make no finding whether it is or not.

168 I am satisfied that the insert solid fuel heater was not installed by a plumber registered to undertake mechanical services. I am also satisfied that the insert and its flue have not been installed in accordance with 3.7.3.4 of the BCA. I accept the evidence of Mr NSR that the fireplace was not used after he and his wife became aware of the potential contact between it and the cellulose insulation. I note Mr VJV's comment that he had a video to show that the Owners had used the fireplace after they became aware of the potential risk, but he did not produce the video in evidence.

169 The Owners seek the sum of $770 in accordance with an undated quote by Trinity Baird of the Grey Army ("Grey Army Quote"). In the course of the hearing Mr VJV said that a plumber could undertake the work for approximately $100, exclusive of materials, but provided no other evidence. He said that the flue parts, by which I understand he means the elbows, should have been provided by the Owners. However I am not satisfied that the alleged need for elbows was ever communicated to the Owners during the course of building and I am not satisfied that if the chimney structure had been competently constructed there would have been any need for elbows.

170 The Builder must allow the Owners two thirds of $770, being $513.

New Toilet Extension

171 Item 12 of the VBA report states that although the contract documents did not call for an exhaust fan or fixed ventilation, there was no ventilation to the toilet and section 3.8.5.2 of the BCA requires ventilation and concludes:

> Although the contract specifications did not allow for the installation of an exhaust fan to the toilet, as ventilation in the toilet has not been provided in accordance with the requirements of part 3.8.5.2 of the BCA, a defect is noted.

172 In his statement of 28 July 2017, Mr VJV said he understood ventilation of the ensuite toilet had been rectified by the Builder's electrician, but I am not

satisfied this occurred. During evidence on 14 September 2017, Mr VJV agreed that ventilation was necessary. He said that the Builder's electrician had been paid to provide it and it would have been done without delay, although it is also noted that the Builder sent the Final Certificate and Final Claim without rectifying this defect.

173 I accept Mr NSR'S evidence that the Owners have had the toilet vent rectified at a cost of $286. I also note Mr VJV's evidence that he had not paid the electrician for the sum, which was allegedly included in the electrician's price, for a fan.

174 The Builder must allow the Owners two thirds of $286, being $190.

Walls to the cellar

175 Item 1 of the VBA report identified that the cellar walls were to be lined in ply but three of the enclosing walls were lined in plaster and one was not lined at all. As stated above under "Variations", the Builder alleges that there was a variation for this item, for which it was entitled to an additional amount. Any such variation was not in writing.

176 Mr VJV said that he discussed the matter with Mrs NSR. As mentioned above, on the last day of the hearing, Mrs NSR was present. I accept her evidence that she did not have a conversation with Mr VJV about changing the lining of the cellar and note that Mr VJV changed his evidence to accord with Mrs NSR'S evidence. I accept Mr NSR'S evidence that he wanted ply in that area rather than plaster for temperature control.

177 I am satisfied that there was not a variation for this item and that lining the cellar with plaster rather than ply was a breach of the contract. The Grey Army quotation for this work was $385.

178 The Builder must allow the Owners two thirds of $385, being $256.

Cellar Door

179 All the photographs of the door indicate that it is quite attractive and rustic - looking. In their Points of Claim the Owners allege that the door has not been constructed in accordance with specifications and is also warped.

180 The door is timber on a substrate of cross ply, according to Mr VJV's evidence. At item 1 of the VBA report, Mr Liddy said that the contract specifications did not clearly identify that the door was to be constructed of solid timber and therefore he could not determine that the materials from which it was constructed were defective. However, Mr Liddy also found that the door was warped and did not function as intended.

181 At the hearing on 14 September 2017, Mr NSR said that the clearances around the door should be approximately 5 mm but they ranged between 7 and 9 mm. I am not satisfied that this disparity in clearances makes this door, of rustic appearance, defective.

182 Mr Stark said that in their letter of 8 June 2015 the Owners said that they had undertaken various works including sanding and filling. He speculated that they might have taken the door off and rehung it and he alleged that in finishing the door, the Owners saturated it with oil, which, he alleged, could cause the boards to cup.

183 Mr NSR denied that he had removed and rehung the door. He said he did nothing except sanding it lightly and applying tung oil. Mr Stark asked whether Mr NSR had stabilised the door before working on it, which Mr NSR did not answer.

184 As the Owners worked on the door before the warping was detected, I am not satisfied that any defect to the door was due to poor workmanship by the Builder.

185 There is no allowance for the door.

Metal Shelving in the Garage

186 The parties agree that the metal shelving in the garage is second hand. The Owners say that in accordance with s8(b) of the DBC Act, materials must be new. This is true, but it is also noted that the contract documents called for the shelving to be made from recycled MDF from the bedroom wardrobe.

187 In the Builder's Variation List, number 9, was:

> Brand New 'Rack It' heavy duty steel racking requested while in progress …

188 During the hearing on 14 September 2017, Mr VJV said that it was necessary to change from the original design, which he noted included recycled materials, to enable the Owners to park a car with the bonnet under the shelves. He said it was reasonable that the steel be second hand as well.

189 Mr VJV said that Mr NSR rejected the 'Rack It' product as it was from Bunnings. He said he told Mrs NSR that the only shelving available was second hand from Safe n Storage, which led to variation 10 in the Builder's Variation List:

> Reconditioned industrial grade heavy duty steel racking requested while in progress in lieu of Brand New 'Rack It" heavy duty steel racking.

190 Mr VJV also said that Mrs NSR was present and assisting Mr VJV and the Builder's carpenter when the shelving was being installed, by testing whether the bonnet of the car would fit beneath it. Mrs NSR agreed that she was present to check that she could park a car there. I asked whether she realised the shelving was second hand and she replied that it looked chipped and had stickers on it but she did not comment about this because the issue concerning the shelving was between Mr NSR and the Builder.

191 I note that both variations 9 and 10 are shown as "E" for electronic on the Builder's Variation List. As mentioned above, neither party drew my attention to the alleged electronic communications regarding the shelving.

192 Given the difficult history of the shelving, I am not satisfied that the eventual shelving used was a breach of contract and make no allowance for it.

Timber shelving in the garage

193 As mentioned above, the parties agree that there was a sketch for the timber shelving provided by the Owners, and it became one of contract documents. The owners complain:

- the shelving above the trough was to be 800 mm deep but is narrower;
- poor or second hand timber was used;
- the shelving was poorly finished; and
- the hanging rail does not meet the specifications.

Shelving width

194 The signed page of the building contract which is the Owners' sketch shows that the shelving was to be 800 mm deep for a width of 1 m immediately above the trough. It has not been built in this manner. Mr VJV said that he cut the shelving back to prevent Mr NSR from hitting his head while using the trough. However there is no evidence that Mr VJV discussed this with Mr NSR.

195 The Builder was not entitled to make a unilateral change without obtaining a variation from the Owners. I am satisfied that in this respect, the shelving has not been built in accordance with the contract obligations of the Builder.

Materials and finish

196 The VBA report included:

> Observations at the time of the inspection revealed that the storage area had been constructed from 90 x 35 Pine, two 40 x 45 LVL beams and plywood shelving. … Areas of nail holes not filled, screws not fitted to the hanging rail and a poor finish to the cutouts to the ply shelving.

197 The report continued:

> Contract specifications available at the time of inspection did not contain information as to the required finish to be provided to the shelving. … As the contract specifications did not contain information as to the required finish to the shelving, a defect could not be determined.

198 I do not find the conclusion in the VBA report surprising. The photographs indicate that the materials and finish are to some degree rough, but they do not look out of place in garage shelves.

Hanging rail

199 One of the contract documents signed to form part of the contract was on the Builder's letterhead and commenced "Contract Project Proposal 09/03/15". On the first page under "Zone 2" appears:

> Install a Stainless Steel workbench in large trough with a heavy duty S/S hanging rail above for washing & hanging dive suits and equipment … [underlining added]

200 The VBA report indicates that the hanging rail is approximately 25 mm in diameter, appears to be telescopic from the third photograph that follows item 3 and has a silver appearance.

201 The Owners allege that the Builder did not install a rail as required by the specifications. On 14 September 2017, Mr VJV gave evidence under cross examination that he bought the rail from Bunnings at Narre Warren.

202 On 1 December 2017 Mr Adam Morton of Bunnings responded to the witness summons to it by sending an email. The relevant parts of the email are:

> On behalf of Bunnings I am responding to your request for information sent to [a Bunnings employee]. The request was as to whether Bunnings is likely to have sold a Stainless Steel Rod 24 – 27 mm diameter with a single length of 2.3 m between 21 May and 14 June 2015.
>
> We have looked through our sales records and range lists and can confirm that Bunnings does not have any record of having stocked anything matching that description during that time period, and does not do so to this day.
>
> The only product in our range from that period that would be close to the described item is a Telescopic Stainless Steel rod, which is 24 mm in diameter and extends up to 2.4 m.

203 Having regard to the photograph in the VBA report, I do not accept Mr NSR'S evidence that the rail installed in the Owners' garage is not telescopic, and I cannot be satisfied that the rod installed was not a heavy duty stainless steel rod.

Allowance for this item

204 The Grey Army quotation allows $880 for this item together with painting second hand pallet shelving. In the absence of better evidence, and allowing only for rectification of the shelving immediately above the trough, I order that the Builder allow the Owners two thirds of $75, being $50.

Downlights in Robe, Bathroom and Toilet

205 The parties agree that the specifications called for 4 downlights but only 3 were installed. I am satisfied that the Owners had the additional downlight installed at the same time as installation of the exhaust fan for the ensuite toilet and that the sum allowed includes the additional downlight.

206 Mr VJV said that there was a verbal variation to delete the third downlight, but I prefer the evidence of Mr NSR that this was not so.

207 Having allowed $190 for installation of ventilation to the ensuite toilet, there is no further allowance for this item.

Shelving under the Stair

208 The shelving referred to is apparently used by the Owners as their linen cupboard. The VBA report described unfilled nail holes, visible raw edges and a poor finish to cutting/checkouts to the shelving installed under the stairs. The report also stated that the nail holes, raw edges and gaps were visible from a normal viewing position.

209 The Grey Army quote for this item is for $330 for the following work:

> Finish shelves under the staircase including a new end panel gapping around the cuts and sending painting raw ends. Fix back board to the bottom of the pantry.

210 Mr VJV said that the work was incomplete when the Owners repudiated the contract. Having regard to the photographs in the VBA report I am not satisfied that they justify work to the value of $330. Mr VJV gave evidence that the cost to complete would be approximately $55 for filling a few nail holes and painting.

211 In the absence of better evidence, the Builder must allow the Owner two thirds of $125 being $83.

Insulation

212 At the hearing on 15 September 2017, Mr NSR said that he believed there was a deficiency concerning preventing insulation from being too close to the downlights and falling into the chimney space, but that the issue was too difficult to determine and he was not pursuing it.

Doors to the Bedroom and Robe

213 The parties agree that the doors to the bedroom and robe need to be cut down to be clear of the floor coverings. Mr VJV said that if the Builder did work it would be approximately $120 for labour and $5 for materials.

214 The Owners had sought $330 in accordance with the Grey Army quote. However, Mr NSR amended the claim to $220 at the hearing. Given the need to paint as well as to undertake carpentry, I find that the Builder must allow the Owners two thirds of $220 being $147.

Tiling to the Ensuite

215 The Owners complain that the tiles in the shower run 140 mm above the shower screen rather than 100 mm above the shower screen.

216 I accept Mr VJV's evidence that the layout of the tiles was discussed on site and the tiling is in accordance with the discussion. Further, I note that the photographs in the VBA report show that the tiling is almost exactly aligned with the top of the architrave around the door, looks competent and did not require tiles to be cut.

217 I am not satisfied that there is defect or breach of contract and I make no allowance for this item.

Downpipe outside the New Toilet

218 The parties agree that the downpipe outside the new toilet is missing a bracket. Mr NSR said that it is included in the quotation for flashing above the glass brick window.

219 I accept Mr VJV's evidence that the proper price for this item is for three brackets, so that they match and 30 minutes of labour being a total price of approximately $50.

220 As I will allow a total of $110 for flashing and also the installation of the necessary bracket, there is no separate allowance for this item.

Damage to Existing Tiles

221 The parties agree that there is some damage to pre-existing tiles in the hallway, although they appear to disagree about the extent of the damage. The Grey Army quotation is for $275. Mr VJV's evidence is that two matching tiles could be supplied and laid for approximately $150.

222 Given the difficulty of matching tiles, I prefer the Grey Army quotation.

223 The Builder must allow the Owners two thirds of $275 being $183.

Damage to Existing Plaster of Kitchen Cupboard

224 The Owners allege that the existing kitchen cupboard next to the new sliding door has been damaged with unsecure plaster and skirting boards.

225 Mr VJV denied that any work undertaken had caused damage in this area.

226 I make no allowance for this item because I cannot be satisfied that movement in the kitchen cupboard has been caused by the Builder's work. Further, I am not satisfied that any defect in this area is visible from a normal viewing position as it is apparently under the bottom shelf of the kitchen cupboard and there is no indication of defect in the photograph at item 14 of the VBA report.

Installation of Water Feature Spout

227 The Builder was required, as part of the work, to provide a stainless steel cover plate and fountain spout for a water feature that causes a flat sheet of water to flow into the swimming pool. The Owners complain that it was not completed properly and that water leaks out of the back of the cover plate. The Owners seek $220 to rectify in accordance with the Grey Army quote.

228 Mr VJV's evidence is that the Builder did what was called for by the specification but had not finished the caulking.

229 I prefer Mr VJV's evidence. In the absence of better evidence the Builder must allow the Owners two thirds of $220 being $147.

Installation of Glass Brick Window to New Toilet

230 The parties agree that the glass brick window needed to be properly flashed. I accept Mr NSR'S evidence that the price for the flashing and installation of the downpipe bracket was $165. The Builder must allow to the Owners two thirds of $265 being $110.

Water Hammer Associated with New Toilet

231 Although not included in the Grey Army quotation, the VBA report identified a water hammer. Mr NSR said he would accept Mr VJV's evidence regarding the cost of a third party builder undertaking work.

232 I accept Mr VJV's evidence that, if he arrange the work himself it would be at no cost (other than administration) because he would have had the plumber returned to rectify the job. I also accept his evidence that a fair price for a third party rectifier is $90 which the Builder must allow to the Owners.

233 The Builder must nevertheless allow something to the Owners, and I find that $60 is a reasonable sum.

Total for defects and incomplete work

Fireplace	$513
Toilet Vent	$190
Walls to cellar	$256
Timber shelving in garage	$50
Shelving under stair	$83
Doors to bedroom and robe	$147
Existing tiles damaged	$183
Installation of water feature spout	$50
Flashing to toilet window	$110
Water hammer	$60
	$1,632

Exemplary damages

234 The Owners maintained their claim that the Builder had acted illegally in certain respects, but did not wish to argue further that they were entitled to exemplary damages.

235 I remarked during the hearing that recovering exemplary damages is extremely rare. If there was any illegality by the Builder, it was not touched by the degree of moral turpitude that would result in exemplary damages.

RECONCILIATION

Amount agreed by the parties to be unpaid under the contract	$5,755
Variations, to Builder	$440
	$6,195
Defects and incomplete works	-$1,632
The Owners must pay the Builder	$4,563

COSTS AND INTEREST

236 Costs and interest are reserved with liberty to apply.

SENIOR MEMBER M. LOTHIAN